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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 818

TRANSCONTINENTAL BUS SYSTEM, INC. ET AL,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

HOWARD S. BOROS
ROBERT C. LESTER
BOROS & LESTER
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

WARREN A. GOFF
315 Continental Avenue
Dallas, Texas

Attorneys for Petitioners

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TRANSCONTINENTAL BUS SYSTEM, INC. ET AL,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of

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[1] The Petitioners are: Adirondack Transit Lines, Inc., Atlantic Stages, Inc., Capitol Motor Lines, Capitol Bus Company, Inc., Carolina Coach Co., Carolina Scenic Stages, Coastal Stages Corp., Colonial Trailways, American Buslines, Inc., Arkansas Motor Coaches, Ltd., Continental Central Lines, Continental Crescent Lines, Continental Dixie Lines, Continental Eastern Trailways, Midwest Buslines, Inc., Continental Pacific Lines, Continental Panhandle Lines, Continental Rocky Mountain Lines, Continental

Appeals for the Fifth Circuit entered in Case No. 22791 *et al.*[2] on July 24, 1967.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in Case No. 22791 is unreported. It is printed in Appendix A hereof (pp. 1a-44a, *infra*). The decision and opinion of Respondent Civil Aeronautics Board which was reviewed by the said United States Court of Appeals in Case No. 11791 *et al.* is designated Order No. E-22186, May 20, 1965 (Appendix B, pp. 45a-57a, *infra*).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 24, 1967. On October 13, 1967 Justice Hugo L. Black granted an extension of time to file this Petition until November 14, 1967. The jurisdiction of this court rests on 28 U.S.C. 1254.

Southern Lines, Continental Tennessee Lines, Continental Bus System, Inc., Union Bus Lines, Inc., Continental Western Lines, De Luxe Trailways, Inc., D.C.S.P. Motor Way, Inc., D.S.L.P. Stages, Inc., Western New York Motor Lines, Inc., Evergreen Trails, Inc., Georgia-Florida Coaches, Inc., Martz Coach Company, Ohio Trailways, Inc., Mt. Hood Stages, Inc., Queen City Coach Co., Safeway Trails, Inc., Service Coach Line, Inc., Smoky Mountain Stages, Indianapolis and Southeastern Trailways, Inc., Southern Stages, Inc., Tamiami Trail Tours, Inc., Tennessee Trailways, Trailways of New England, Inc., Transcontinental Bus System, Inc., Valley Transit Lines, Inc., Virginia State Lines, Inc., National Trailways Bus System and Southern Tier Trailways.

[2] Case Nos. 23020-23027, inclusive, 23054, 23099, 23512, 23513, 23410 and 23411 were consolidated with 22791. Petitioners are seeking a writ of certiorari in all of the consolidated cases except 23410 and 23411.

QUESTION PRESENTED

Whether airline passenger tariffs which offer half-fare air transportation to members of the armed forces on active duty but to no one else are unjustly discriminatory or unduly preferential and prejudicial in violation of Section 404(b) of the Federal Aviation Act of 1958, as amended.

STATUTES INVOLVED

Section 102 (72 Stat. 740, 49 U.S.C. 1302), Section 403(b) (72 Stat. 758, 49 U.S.C. 1373(b)), Section 404(b) (72 Stat. 760, 49 U.S.C. 1374(b)), and Section 1002 (72 Stat. 788, 49 U.S.C. 1482) of the Federal Aviation Act of 1958, are summarized in pertinent part in the Statement, p. 3 *et seq., infra,* and are set out in full in Appendix C, p. 58a *et seq., infra.*

STATEMENT

Air fare discounts for military personnel travelling at their own expense were first authorized by the Civil Aeronautics Board ("the Board") in 1956 when Part 227 of the Economic Regulations was promulgated.[3] It provided for discounts to servicemen travelling in overseas transportation between the then territories of Alaska and Hawaii, on the one hand, and the forty-eight states and the District of Columbia, on the other. This rule was issued pursuant to Section 403(b) of the Civil Aeronautics Act of 1938, as amended,[4] which in pertinent part provides:

> ". . . Nothing in this Act shall prohibit such air carriers or foreign air carriers, under such terms

[3] 21 Fed. Reg. 264-65, January 13, 1956.

[4] Re-enacted as Section 403(b) of the Federal Aviation Act of 1958. (72 Stat. 758, 49 U.S.C. 1373(b)).

> and conditions as the Board may prescribe, from issuing or interchanging tickets or passes for free or reduced-rate transportation . . . in the case of overseas or foreign air transportation to such . . . persons and under such . . . circumstances as the Board may by regulations prescribe . . ."[5]

After Alaska and Hawaii became states, air transportation between these areas and the other states constituted interstate rather than overseas transportation as defined by the Federal Aviation Act of 1958, as amended (the "Act").[6] Therefore, the Board no longer possessed authority under Section 403(b) to permit reduced rates for servicemen. It advised the Senate that it required specific authority by amendment of Section 403(b) to continue the practice of permitting carriers to offer servicemen reduced-rate transportation between Alaska and Hawaii and the other states.[7] The Board also urged that the requested amendment be sufficiently broad to authorize transportation of servicemen on leave or furlough at reduced rates between any points in all fifty states.[8] The Senate adopted this proposal in part by amending a pending bill which provided for reduced-rate transportation for other classes of persons. However, the Senate amendment limited the scope of reduced rates for servicemen to

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[5] The full text of Section 403(b) is set forth in Appendix C, pp. 59a-60a, *infra*.

[6] Section 101 (21), 72 Stat. 737, 49 U.S.C. 1301 (Appendix C, p. 63a, *infra*).

[7] Hearings before the Aviation Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess., pp. 3, 10-11, 20.

[8] *Ibid.*

air travel between Alaska and Hawaii, on the one hand, and the other forty-eight states, on the other.[9] This proposed amendment was deleted from the final bill by a conference committee at the insistence of the House of Representatives.[10] Thereafter, all outstanding tariffs providing discounts for servicemen travelling at their own expense were cancelled.

Three years later, in 1963, American Airlines published a military "standby" tariff which offered servicemen on furlough 50 percent discounts from regular coach fares when travelling subject to space availability. This tariff was applicable over American's entire interstate route network. Delta Air Lines and Northwest Airlines filed complaints requesting that the tariff be suspended and investigated by the Civil Aeronautics Board. Complainants maintained that reduced rates for servicemen were unjustly discriminatory and unduly preferential and prejudicial under Section 404(b) of the Federal Aviation Act of 1958, as amended.[11] They urged that servicemen were not exempt from the proscriptions of Section 404(b) by Section 403(b) as were a limited number of classes

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[9] Senate Report No. 1281, 86th Cong., 2d Sess., p. 3.

[10] 106 Cong. Record pp. 14770-14771 (June 29, 1960).

[11] "No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Section 404(b) (72 Stat. 760, 49 U.S.C. 1374(b)).

of traffic,[12] and, therefore, the military "standby" tariff was illegal. Complainants also contended that the proposed 50 percent discount was unreasonable from a value of service and cost standpoint, and would prove uneconomic.

American Airlines responded to the complaints pointing out that military furlough traffic was principally transported by surface carriers and that the proposed tariff could make substantial inroads into thta traffic. It estimated the potential air travel market at $200,000,000 annually.

The Civil Aeronautics Board dismissed the complaints (Order E-19376, March 14, 1963). It found

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[12] In pertinent part, Section 403(b) (74 Stat. 445, 49 U.S.C. 1373(b)) reads as follows: ". . . . Nothing in this Act shall prohibit such air carriers or foreign air carriers, under such terms and conditions as the Board may prescribe, from issuing or interchanging tickets or pasess for free or reduced-rate transportation to their directors, officers, and employees (including retired directors, officers, and employees who are receiving retirement benefits from any carrier or foreign air carrier), the parents and immediate families of such officers and employees, and the immediate families of such directors; widows, widowers, and minor children of employees who have died as a direct result of person injury sustained while in the performance of duty in the service of such air carrier or foreign air carrier; witnesses and attorneys attending any legal investigation in which any such air carrier is interested; persons injured in aircraft accidents and physicians and nurses attending such persons; immediate families, including parents, of persons injured or killed in aircraft accidents where the object is to transport such persons in connection with such accident; and any person or property with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation; and, in the case of overseas or foreign air transportation to such other persons and under such other circumstances as the Board may by regulations prescribe. Any air carrier or foreign air carrier, under such terms and conditions as the Board may prescribe may grant reduced-rate transportation to ministers of religion on a space-available basis."

that the standby character of the proposal distinguished it from regular fare service, particularly as passengers availing themselves of the discount fare could be off-loaded at intermediate points to provide space for full fare passengers. The Board recognized that the tariff was "inherently discriminatory" because its availability was restricted to servicemen. But it concluded that the discrimination was justified because of the national defense interest in promoting military morale, and the economic benefit accruing to the air carriers from being granted the opportunity to compete more effectively with surface carriers for military furlough traffic.

Virtually all certificated air carriers adopted American's military standby tariff in one form or another. Gradually the applicability of these fares was broadened. Military standby passengers were permitted to be carried in the first-class compartment of all aircraft when the coach compartment was fully occupied. The special discount was also made available to servicemen traveling on permanent change of station, or within seven days after discharge from the armed services, irrespective of whether they received a transportation allowance from the government for their travel. In some instances, the tariffs granted free baggage allowances greater than those available to civilian passengers paying first class fares.[18]

These tariffs were at first regarded as experimental. Generally, they were due to expire during the early months of 1965. Allegheny Airlines, a subsidized local service carrier, requested the first extension. Its proposal bore no expiration date. Petitioners filed a

[18] Sixty-six pounds for servicemen traveling on permanent change of station; forty pounds for first-class passengers.

complaint requesting suspension and investigation of that tariff (R. 1). The complaint alleged that the discount military standby fares had diverted traffic and revenue from complainants' bus services, and would continue to do so in the future. It maintained that these reduced fares represented illegal, unjust discrimination under Section 404(b) of the Federal Aviation Act of 1958 because they were based solely upon the identity and mission of a class of travelers upon which class Section 403(b) of the Act did not confer preferential rate treatment. Petitioners contended that such preferential treatment was unlawful absent specific Congressional authorization in Section 403(b), and that Allegheny's tariff was unduly preferential and prejudicial, unreasonable, unjust, and otherwise unlawful under Sections 102, 403(b) and 404(b) of the Act.

The Board refused to suspend Allegheny's tariff (R. 43). It regarded the power to suspend as useful principally in maintaining the status quo while a tariff was being investigated in a formal proceeding. As Allegheny's military standby tariff had been in effect for some time, the Board did not consider suspension appropriate. It deferred decision on whether to institute an investigation.

Shortly thereafter, nineteen other air carriers sought extensions of their military standby tariffs. Petitioners filed complaints against all of these proposals. (R. 63-107, 135-173, 197-241, 277-334, 358-409, 497-554). The Board dismissed all of the complaints (R. 258; Appendix B, p. 45a, *infra*). It found that the standby fares had proved economically beneficial to the airline industry and valuable as tools in competing with surface transportation, as well as helpful to the morale

of the armed services. These considerations, in the Board's judgment, sufficiently mitigated the discriminatory character of the tariffs to remove them from the area of forbidden, unjustly discriminatory fares. It also found that the standby nature of the service distinguished it sufficiently from regular fare service to avoid any unjust discrimination or undue prejudice against regular fare passengers[14] (Appendix B, p. 51a, *infra.*)

Petitioners requested judicial review of the Board's orders denying suspension and investigation in eleven United States Courts of Appeals. Jurisdiction of these courts rested on Section 1006 of the Federal Aviation Act of 1958, as amended (72 Stat. 795, 49 U.S.C. 1486). These cases were consolidated for decision in the Court of Appeals for the Fifth Circuit (Case No. 22971, *et al.*)

That court also consolidated Petitioners' request for review of the Board's refusal to investigate discount air fares for "youths" between 12 and 22 years of age. These latter fares were the subject of separate complaints filed with the Civil Aeronautics Board and were also before the Court of Appeals for the Fifth Circuit on separate petitions for review.

The court affirmed the Board's dismissal of Petitioners' complaints against the military standby fares, and reversed and remanded its dismissal of Petitioners' complaints against the "youth" fares for further proceedings (Case Nos. 23410, 23411). The court found that the Board did not abuse its discretion in

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[14] Since that ruling most airlines have published military furlough tariffs which permit advance reservations. These tariffs provide for fare discounts ranging from 33⅓% to 50% of the applicable coach fares.

finding that the military standby fares were not unjustly discriminatory, because the circumstances and conditions surrounding the transportation of military standby traffic were substantially dissimilar from those obtaining in the case of nonmilitary traffic to which the reduced standby fares were not available. The dissimilar conditions and circumstances were found to be (1) competition, i.e., the need to compete with surface carriers for military business; and (2) considerations of national defense, i.e., reduced rates to servicemen traveling on furlough or leave enable them to spend less time in transit, thereby increasing the morale of the armed forces and contributing to the national defense (Appendix A, p. 36a, *infra*). The court cited no judicial precedent in support of this conclusion.[15] In the case of the "youth" fares, the court found that the promotional and social policy factors which the Board cited in justifying their discriminatory aspects were not appropriate considerations under Section 102 of the Act.

On the issue of reasonableness of the discount, the court affirmed the Board.[16] It accepted the Board's finding that military standby traffic used otherwise unoccupied seats and that the air carriers were not scheduling service to accommodate this traffic. Accordingly, it held that the Board's conclusion that these fares were compensatory and, therefore, reasonable, did not constitute an abuse of discretion (Appendix A, pp. 43a-44a, *infra*).

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[15] The competitive and national defense considerations were cited by the court as proper factors under Section 102 of the Federal Aviation Act in testing fares alleged to be unjustly discriminatory under Section 404(b).

[16] It did not reach that issue in the youth fare cases.

REASONS FOR GRANTING THE WRIT

I

The important question before this Court is whether the "rule of equality" in ratemaking is to prevail in the regulation of air transportation as it has in the related area of surface transportation. The need for equality prompted enactment of the Interstate Commerce Act of 1887.[17] *New York, N.H. & H.R.R.* v. *Interstate Commerce Commission,* 200 U.S. 361, 391-92, 50 L. ed. 515, 521 (1906). The rule, as embodied in that statute requires equivalent rates where: (1) the services are like and contemporaneous; (2) the traffic is similar; and (3) the circumstances and conditions under which the services are rendered are similar. *Wight* v. *United States,* 167 U.S. 512, 42 L. ed. 258 (1897); *Interstate Commerce Commission* v. *Delaware L.W.R.R.,* 220 U.S. 235, 55 L. ed. 448 (1911).

This Court has insisted that common carriers offer equal rates and equal services to all persons irrespective of age, mission, business or status. *Wight* v. *United States, supra; Interstate Commerce Commission* v. *Alabama Midland Railway Co.,* 168 U.S. 144, 168, 42 L. ed. 414, 423 (1897); *Interstate Commerce Commission* v. *Baltimore & Ohio R.R. Co.,* 225 U.S. 326, 342, 56 L. ed. 1107, 1112 (1912); *Louisville & Nashville R.R.* v. *United States,* 282 U.S. 740, 75 L. ed. 672 (1931); *Baltimore & Ohio R.R. Co.* v. *United States,* 305 U.S. 507, 83 L. ed. 318 (1938); *United States* v. *Chicago Heights Trucking Co.,* 310 U.S. 344, 84 L. ed. 1243 (1940); *American Trucking Association, Inc.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 387 U.S. 397 (1967). The issue is whether these precedents, governing seventy years of surface freight rate regula-

[17] 24 Stat. 379, 49 U.S.C. 1.

tion, should be applied to the regulation of air transportation passenger rates.

This Court has never passed upon a controversy involving the lawfulness of passenger fares offered by surface or air carriers. It has never had occasion to review any airline rates or charges. Indeed, during the thirty years since air transportation became subject to federal regulation, the United States Courts of Appeals have reviewed the legality of allegedly unjustly discriminatory airline rates in only one previous instance. *Flying Tiger Line, Inc.* v. *Civil Aeronautics Board,* 350 F. 2d 462 (D. C. Cir., 1965).

The national significance of the issue is directly tied to the emergence of air travel as the principal mode of domestic, common carrier transportation. During 1966, over 60 percent of domestic, inter-city revenue passenger miles were generated by air carriers.[18] A large portion of this air travel was performed at fares which were available only to particular classes of persons, e.g. servicemen, youths, families. Every certificated air carrier offers system-wide discount fares. Currently, over 150 discount tariffs are in effect. Each carrier publishes approximately 12 such tariffs applicable to all markets served.

These discounts are characterized by varying degrees of discrimination. For example, the family fares published by all carriers offer discounts to certain family members traveling together. A discount ranging from 25 percent to 50 percent, depending upon the

[18] Address by the Honorable Robert T. Murphy, Vice Chairman, Civil Aeronautics Board, before the National Airports Conference of the American Association of Airport Executives. Norman, Oklahoma, October 11, 1967.

carrier, is given to the wife when traveling with her husband.[19] If the couple is accompanied by a child 12 through 21 years of age, that child and all other children are charged 25 percent to 50 percent of the regular fare. The family fare discount is solely geared to the status of the traffic, a status wholly unrelated to any transportation considerations. Even within the immediate family discrimination is practiced, because the discounts are not available to siblings traveling together, or to children over 21 years old when traveling with parents. Another example of these discount fares is the "First Rider" tariff of Trans-Texas Airways, which offers passengers over 21 years old, who have never flown on a certificated air carrier, a round-trip between any two points on its system at a flat rate of $25.00.[20]

The Board has generally encouraged airlines to develop so-called promotional discounts on the theory that the improved carrier earnings realized therefrom contribute to the lowering, or at least the stabilization, of the average fare level for all passengers. Chairman Charles E. Murphy of the Civil Aeronautics Board testified on this theory as follows:[21]

Senator Monroney:

"Do you monitor the so-called promotional fares? . . ."

Mr. Charles Murphy:

"Senator, we do monitor them in this sense: that we have approved every one of them. At least we

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[19] Reuben H. Donnelley, *Official Airline Guide* (Quick Reference Edition).

[20] *Ibid.*

[21] Hearings before the Subcommittee of the Senate Committee on Appropriations, 90th Cong., 1st Sess. on H.R. 9960, pp. 886-887.

did not disapprove any of them, and we could have. We could have disapproved any of them. And we looked at all of them. I suppose I should say that by and large, not in every case, but by and large, we have encouraged the air carriers to experiment with these promotional fares. I am convinced in my own mind that it is possible for the basic fare to be lower because they have these promotional fares. If we do not have these promotional fares, instead of being able to reduce the basic fare for everybody, we would have to increase it for everybody. And for those who don't want to fool with the complications, they can always go and buy a regular fare ticket. . . ."

Senator Monroney:

"But the basic fares haven't been lowered, I don't think. You had a 10-percent surcharge that was put on when the jets came in because they thought jets would be expensive to operate. They proved to be less expensive to operate. They run at full capacity all the time. And it seems to me that the regular travelers are entitled to some consideration, and not have it on the gimmicks. We have got so many crazy rates that nobody can possibly take advantage of them. And there should be something to encourage the regular travelers who might use this vital means of transportation."

Mr. Charles Murphy:

"The basic fares have been lowered in some cases, but generally there has not been a great deal of that. That is certainly true. And I will agree, everyone at the Board will agree, that the regular traveler is entitled, I would say, to primary consideration. But I would say, again, that it seems to me, at least, that the regular traveler, although his fare has not been reduced, his fare is not as high as it would have to be if it were not for the fact that these promotional fares carry part of the

> cost. We do not have a staff study that supports the statement that I have just made. So far as I know, the staff wouldn't disagree with me; we just haven't had the opportunity to make a study to see whether it is true or not. I believe it is true. . . ."

Thus, the premise is that those who are denied equal treatment are advantaged by the preferences accorded others, because the former would be worse off if the preferred class did not exist.[22] On this basis, preferential discounts which profit the proponent carrier are not deemed by the Board unjustly discriminatory to the excluded class because they financially benefit that class.

This philosophy, in large part, underlay the Board's decision to approve without investigation the military discounts which are the subject of this Petition. The original proponent of these discounts, American Airlines, urged Board approval because the air carriers had historically participated only to a relatively small extent in military furlough traffic. It estimated the potential air travel market for military furlough traffic at $200,000,000 annually (Order E-19376, p. 2, March 14, 1963). The Board found that the ability of surface carriers to offer reduced rates to the military pursuant to specific statutory authority constituted a

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[22] This view appears to be at variance with the long-term historic trend. In 1957, the year prior to introduction of highly economic jet aircraft in domestic transportation, the average fare per revenue passenger mile was 5.29¢. In 1966, when the overwhelming volume of air service was performed with jets, the average fare was 5.83¢ per revenue passenger mile. This 10.2% increase in the fare level was experienced despite the existence of a large number and wide variety of discount fares in 1966. During the same span, expenses per available ton mile rose by only 1.7%. *C.A.B. Air Carrier Traffic Statistics; C.A.B. Air Carrier Financial Statistics.*

competitive factor which justified the discriminatory fare proposed by American Airlines (*Id.* at p. 3). This conclusion was affirmed by the court below (R. 123).

It is clear that the competitive concept which the Board employed to justify the inherently discriminatory military discounts is markedly different from the traditional concept. These discounts were not offered to protect the historic traffic of the airlines. To the contrary, they were offered to divert the historic traffic of the surface carriers.[23] The size of the discount confirms this objective. Whereas surface carrier military discounts had generally ranged between 10 percent and 15 percent of the regular fares (R. 16), the airlines were proposing 50 percent discounts. Consequently, the airline discounts were prompted by promotional aspirations rather than competitive necessities. This reality suggests that Board approval of the military discounts was motivated by the belief that discriminatory fares are justified where they are promotional and potentially profitable to the air carriers.

This approach points up the Board's need for guidance in the development of a rational fare policy consistent with sound ratemaking law. This court can provide that guidance by setting forth the standards which the Board must employ in determining whether discriminatory fares exceed the permissible bounds of the Federal Aviation Act.

II

The case at bar has great prospective importance. The court below affirmed the Board's reliance upon

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[23] In this connection, American Airlines argued that air carriers transported only 10% of military furlough traffic (R. 469).

competition as a justification for approving the military discount fares (Appendix A, p. 53a, *infra*). Under the competitive theory espoused by the Board, no potentially profitable fare discount, irrespective of its discriminatory characteristics, would be barred. For example, the youth fare discounts which the court below found unlawful (*Id.* at 48a-52a), might be subsequently justified by the same type of competitive theory which was applied to the military discounts. The court remanded to the Board its dismissal of Petitioners' complaints against the youth fare discounts (Appendix A, pp. 53a-54a, *infra*), because the Board attempted to justify the discriminatory discounts on the basis of broad social policies favoring youths and the promotional aspirations of the proponent airlines. Should the Board find competitive justifications for these discounts, as it did in the case of the military discounts, presumably it could continue their effectivness. The same rationale might sustain reduced fares for the elderly, an historically significant market for bus service.[24]

Thus, if the competitive justification for military discounts is to prevail, the airlines can, with the Board's encouragement, selectively divert those markets comprising the principal sources of Petitioners' passenger

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[24] Aloha Airlines and Hawaiian Airlines publish reduced fares for persons over 65 years of age traveling on a space available basis between points in Hawaii. Ozark Air Lines, Mohawk Airlines and Trans Caribbean Airways have published similar fares which were either suspended by the Board or withdrawn after an investigation was ordered by the Board. ***Mohawk Airlines Golden Age Excursion Tariff***, Order E-17111, July 6, 1961; ***Ozark Air Lines Senior Citizen Excursion Tariff*** (Order E-21973, March 31, 1965; ***Trans Caribbean Airways Individual Senior Citizens Excursion Tariff***, Order E-23370, March 19, 1966.

revenues. Of equal, if not greater importance, the public at large has a strong interest in this issue. Vice-Chairman Robert T. Murphy of the Civil Aeronautics Board expressed this interest in an opinion dissenting from approval of preferential fares to federal officials traveling by air on "government travel requests":

> ". . . At stake is the essence of the reasonableness and the justice of the basic rates and charges assessed against the general public whose interest we are specially obligated by statute to protect. Once established as a matter of exception to the general anti-discrimination provisions of the Act, it is difficult to perceive any sound method of containing the spread of discounted fares to other bulk users of air travel. As one complainant states: '. . . we cannot see any basis in logic or law upon which similar discounts could be denied to the numerous corporations and other concerns and organizations, including the United Nations, which have adopted *bona fide* policies identical to that cited by Frontier regarding the Federal Government.'[3] Hence, the problem raised by this special tariff transcends the narrow confines in which it is presented to us. It is particularly vexing for one who has long supported a policy of maintaining fair and reasonable rates for the general public, including Government agencies. Some might regard this proposal as merely highlighting the fact that the rates charged by local service carriers are not necessarily commensurate with the grade or quality of their particular

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[3] Complaint of Trans World Airlines, Inc., D. 16608, pp. 3-4.

service vis-a-vis the trunk carriers.[4] For present purposes it is not necessary to treat the matter in these terms. As I see it, continued discounts or reduced fares for special categories of bulk users of air travel, such as Federal Government employees and others, can ultimately lead to the unhappy day when only the lonely, the unorganized, or the disaffiliated will be saddled with a 'full' fare. In my view, the carriers should be encouraged to seek ways and means of achieving general across-the-board reductions benefitting the general public, including Government agencies, rather than pursue courses of action designed to grant special privilege to Government officials in the use of public facilities—a concept alien to our system of democratic self-government."

C.A.B. Order No. E-22929, November 24, 1965.

[4] For example, Western alleges: "Thus Frontier may be hinting that its Convair 580 service is in fact a coach service for which it should be permitted to charge a coach fare to passengers travelling on government transportation requests. If this be the case, the first class fares which Frontier charges the remainder of the traveling public for the same service are not only discriminatory, but are unreasonably high and thus unlawful." Complaint of Western Air Lines, Inc., D. 16597, pg. 2.

III

This case also presents an important issue of statutory interpretation, namely, the scope of Section 404(b) of the Federal Aviation Act and its relationship with Sections 102 and 403(b) of thta Act.[25] Section 404(b) sets forth the anti-discrimination provision of the statute as follows:

"No air carrier or foreign air carrier shall make, give or cause any undue or unreasonable preference

[25] The full text of these sections is quoted in Appendix C, p. 58a *et seq., infra.*

> or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This section expresses the Board's responsibility to observe the "rule of equality" in air transportation ratemaking. It was modeled after Section 2 of the Interstate Commerce Act (Appendix C, p. 67a, *infra*) and, accordingly, is to be interpreted in conformity with judicial decisions construing that section. *Interstate Commerce Commission* v. *Delaware L. & W. R.R. Co.*, 220 U.S. 235, 243, 55 L. ed. 448 (1911); *American Airlines* v. *North American Airlines, Inc.*, 351 U.S. 79, 82, 100 L. ed. 953, 960 (1956).

This court has consistently construed Section 2 of the Interstate Commerce Act as precluding discriminatory prices geared to the identity, mission or status of the preferred or prejudiced class of traffic. Thus, in *Wight* v. *United States*, 167 U.S. 512, 42 L. ed. 258 (1897), a lower rate to one shipper than to another for like and contemporaneous service was deemed unjustly discriminatory. *Interstate Commerce Commission* v. *Baltimore & Ohio R.R. Co.*, 220 U.S. 326, 56 L. ed. 1107 (1912), held that lower rail rates for coal used by railroads than for other coal transported under similar circumstances and conditions were unjustly discriminatory. The free carriage by a railroad of private cars for some persons and not for others was deemed unjustly discriminatory, *Louisville and Nashville R.R.* v. *United States*, 282 U.S. 740, 75 L. ed. 672 (1931), as was the provision of below cost warehousing

to some shippers and not to others, *Baltimore & Ohio R.R. Co.* v. *United States,* 305 U.S. 507, 83 L. ed. 318 (1938).[26]

All discriminatory ratemaking is not barred by Section 2 of the Interstate Commerce Act or by Section 404(b) of the Federal Aviation Act. Discriminatory rates specifically sanctioned by Congress pursuant to its sound appraisal of public needs are allowable. Section 22 of the Interstate Commerce Act[27] sets forth an extensive list of persons who Congress determined could qualify for preferential rates should surface carriers opt to offer them.[28] The Federal Aviation Act's counterpart is Section 403(b). That Section lists those persons and class of persons who are excepted from the "rule of equality" in that they may be offered free or reduced air transportation by virtue of their identity, mission or status.[29] These special categories are generally limited to persons connected with the air transportation industry. In this respect, Section 403(b) differs substantially from Section 22 of the Interstate Commerce Act which makes free or reduced transportation available to an extensive list of persons unconnected with the surface

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[26] To some effect see *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 84 L. ed. 1243 (1940); *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567, 91 L. ed. 1102 (1947).

[27] The text of Section 22 is set forth in Appendix C, pp. 67a-68a, *infra.*

[28] 25 Stat. 862 (as amended by 25 Stat. 862, 28 Stat. 643, 83 Stat. 827, 44 Stat. 1247, 44 Stat. 1446, 48 Stat. 1264, 49 Stat. 543 50 Stat. 475, 50 Stat. 809, 54 Stat. 900, 901, 58 Stat. 751, 70 Stat. 702, 71 Stat. 564, 72 Stat. 1264), 49 U.S.C. 22.

[29] Section 403(b) is quoted in its entirety in Appendix C, pp. 59a-60a, *infra.*

transportation industry, *including servicemen traveling on furlough or leave.*

The Board has had occasion to note the distinction between Section 22 of the Interstate Commerce Act and Section 403(b) of the Civil Aeronautics Act [30] when it rejected a tariff which proposed reduced fares for students. It stated its view as follows:

> "The Congress, however, in writing the Civil Aeronautics Act showed no inclination to prefer students over the general public. The Interstate Commerce Act from which the Civil Aeronautics Act was derived, contains broad provisions in Section 1 (7) and 22 permitting free and reduced transportation to several categories of persons such as ministers of religion, inmates of hospitals and charitable or eleemosynary institutions, indigents and others.
>
> "In passing the Civil Aeronautics Act, the Congress in Section 403(b) which provides for free and reduced-rate transportation, substantially narrowed the categories to whom such transportation could be offered. Neither statute includes students in the categories to be provided such services and both the Interstate Commerce Commission and the Civil Aeronatuics Board have held that granting reduced-rate transportation to students is unjustly discriminatory." [Footnote omitted]. *Capital Group Student Fares,* 25 C.A.B. 280, 285 (1957).

The Board pinpointed the limits of Section 403(b) *In the Matter of an A.T.C.A. Resolution,* Order E-14349, August 17, 1959, stating:

> "It is worth noting that in the field of domestic air transportation, as distinct from overseas and

[30] Section 403(b) of the Civil Aeronautics Act of 1938 was reenacted without change as Section 403(b) of the Federal Aviation Act of 1958.

foreign air transportation, the Congress has not given the Board discretion with respect to the granting of free and reduced rate privileges. Thus, under the terms of Section 403(b), the Board has been given authority to authorize free and reduced rates for domestic, overseas and foreign air transportation for specified categories of persons and, with respect to overseas and foreign air transportation *alone* 'to such other persons and under such other circumstances as the Board may by regulation prescribe.' When it was determined that categories of persons not specifically named in Section 403(b) should be provided with reduced rate transportation domestically, it was deemed necessary to obtain statutory modification from the Congress. . . ."[31]

[2] Section 403(b) of the Act specifically authorizes the Board, by regulation, to permit free or reduced rate transportation to others than those enumerated in the Act with respect to overseas or foreign air transportation, but does not grant similar authority with respect to interstate air transportation. *Joint Application of Pan American World Airways and United Air Lines*, Order E-25757, September 29, 1967.

In 1959, the Board sought an amendment to Section 403(b) to authorize air carriers to offer servicemen free or reduced rates in interstate air transportation. The Board regarded such legislation as a condition precedent to the granting of preferential fares to

[31] As recently as September 29, 1967, after the decision of the Court of Appeals in this case, the Board again commented on the restrictive nature of Section 403(b) ". . . while as indicated in the joint application, free transportation could be provided to passengers participating in inaugural flights in overseas or foreign air transportation pursuant to the Board's regulations, these regulations reflect distinctions created in Section 403(b) of the Act,[2] and similar provision has not been made to permit free or reduced rate transportation in interestate air transportation . . .

servicemen.[32] The Senate also believed that the Board lacked power to authorize carriers to permit reduced rate transportation to servicemen traveling in interstate commerce.[33] However, the proposed legislation was rejected.

The court below did not regard this legislative history or the earlier pronouncements of the Board as determination of the issue of Board statutory authority. It looked to the "Declaration of Policy" of the Federal Aviation Act to ascertain whether the Board possessed the requisite power to permit reduced transportation for servicemen.

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[32] Hearings before the Aviation Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 2d Sess., pp. 3, 20.

[33] "In regard to amendment (4) above, the CAB specifically requested such addition to the bill for the purpose of allowing air carriers to offer reduced rates for furlough travel of military personnel stationed in the States of Alaska or Hawaii in accordance with a practice which the Board has permitted in the years prior to their admission to the Union. Specifically, the Board advised that when Alaska and Hawaii were Territories, air transportation between the States and Alaska or Hawaii was 'overseas air transportation' as defined in the Federal Aviation Act, and consequently, the Board had authority under existing law, to permit air carriers to grant reduced rates to military personnel traveling at their own expense on furlough between the States and these Territories. With their admission to the Union, such transportation can no longer be regarded as 'overseas air transportation' and authority to grant reduced rates under section 403(b) is lacking. 'Your committee adopted the recommendation of the Board but has limited the privilege to travel only between a place in Alaska or Hawaii on the one hand and a place in any of the other States, on the other hand. This amendment would not permit or authorize the carriage of military furlough traffic at reduced rates to or from any other place in the United States." Senate Report No. 1281, 86th Cong., 2d. Sess., p. 3; U. S. Code Congressional and Administrative News, 86th Cong., 2d. Sess., p. 3060.

The Declaration of Policy, in pertinent part, states:[34]

> "In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> "(a) The encouragement and development of an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> * * *
>
> "(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;
>
> "(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;"
>
> * * *

The court concluded that the Board possessed the requisite authority under Section 102 of the Act where the grounds for granting reduced rates to servicemen were, first, the competition of reduced rate travel offered by surface carriers and, second, the national defense would be served by such reduced airline rates, in that the morale of the servicemen would be improved or sustained thereby. Thus, the court below imported the policy provisions of the Statute into the substantive provisions to arrive at the conclusion in issue here. This

[34] Section 102 of the Federal Aviation Act, as amended, (72 Stat. 740, 49 U.S.C. 1302).

conclusion appears to be in conflict with a line of Supreme Court cases.

Thus in *Civil Aeronautics Board* v. *Summerfield,* 347 U.S. 74, 98 L. ed. 513 (1954), this Court reversed a Board rate determination based upon Section 102 policy considerations. Justice Douglas, writing for a unanimous Court stated as follows:

> "It [the Board] maintains that maximum operating efficiency on the part of air carriers and the development of air transportation — prominent objectives of the Act [footnote quoting Section 102 of the Act omitted]—will be better served by setting subsidy rates on a divisional rather than on a system basis. But that is a matter of policy for Congress to decide. As we read Section 406(b) Congress adopted in the present Act a rate formula based on 'the need' of the carrier as measured by its entire operations, even when a rate was being fixed for a class of service."
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> 347 U.S. 74, 79-80, 98 L. ed. 513, 519-520 (1954).

This Court has also ruled on the issue of whether competition or the needs of the national defense are appropriate considerations in determining the legality of allegedly unjustly discriminatory rates.

Since 1897, competition between carriers has not been regarded as a condition or circumstance justifying discriminatory rates. *Wight* v. *United States, supra; Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U.S. 144, 167-168, 12 L. ed. 414, 423 (1897); *Eastern-Central Motor Carriers Association* v. *United States,* 321 U.S. 194, 205-206, 88 L. ed. 668, 676-677 (1944). The only exception is where the regulatory agency is responsible for regulating competition

between modes of transportation subject to its jurisdiction. In such cases, the agencies responsibility to balance intermodal competition is paramount. *Eastern-Central Motor Carriers Association* v. *United States, supra; American Trucking Association* v. *Atchison, Topeka & Santa Fe R.R. Co., supra.*

The Civil Aeronautics Board, however, is limited to regulating the air transportation industry. In this connection, the statutory admonition that the Board consider as being in the public interest "competition to the extent necessary to assure the sound development of an air-transportation system . . ." [35] clearly relates to competition among air carriers, rather competition with surface carriers not subject to its regulation. To interpret this Section otherwise would impose upon the Board the positive responsibility to encourage competition between air carriers and surface carriers by means such as permitting discriminatory rate cutting practices, *inter alia.*

The alternative policy justification for the discriminatory fares at issue here, are the alleged needs of the national defense. Recently, this Court dealt directly with the question of whether the needs of the national defense are appropriate considerations in assessing the lawfulness of discriminatory rates under the Interstate Commerce Act. *Interstate Commerce Commission* v. *New York, N.H. & H.R.R. Co.*, 372 U.S. 744, 10 L.ed 2d, 108 (1963) It held that the Interstate Commerce Commission had the power in establishing rates to consider

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[35] Section 102(d) of the Federal Aviation Act of 1958, as amended. (72 Stat. 740, 49 U.S.C. 1302)

the needs of the national defense only under the most extraordinary circumstances, stating:

> "On the other hand, by recognizing the relevance of such considerations as national defense, we do not imply that these broad policy factors may be applied so freely as to nullify either the more particularized mandates of the National Transportation Policy or the clear congressional design embodied in Section 15a(3) Normally, it is these more specific considerations that should be given the lawfulness of proposed rates in a case involving intermodal competition. Only under extraordinary circumstances may the Commission properly permit them to be outweighed. To justify such a result, we believe it must be demonstrated that the proposed rates in themselves genuinely threaten the continued existence of transportation service that is uniquely capable of filling a transcendent national defense policy or other public need . . ."
>
> 372 U.S. 763-764, 10 L. ed. 2d 108 (1963).

This Court appears to have carved out a narrow exception to the rule that policy considerations may not be imported to overcome the specific statutory provisions governing ratemaking. That exception by its terms does not seem to apply to the instant case. However, to the extent that the *New York, New Haven & Hartford Case* is not regarded as limited to its particular factual context, it is in conflict with this Court's decision in *Civil Aeronautics Board* v. *Summerfield, supra.* The distinction between these cases should be affirmed or, if they are indistinguishable, the conflict should be resolved.

IV

This case also poses the increasingly important issue of the role of the regulatory agency vis-a-vis the Con-

gress. Petitioners do not question that the Civil Aeronautics Board has the power, indeed, the responsibility to formulate certain national air transportation policies. However, where the Congress has traditionally reserved to itself the determination of who may receive preferential fares or rates,[36] it does not appear appropriate for the Board to assume this power in an *ad hoc* situation, merely to meet the exigencies of the moment.

Petitioners do not question that the availability of air transportation to servicemen at a cost within their means contributes to morale. However, the weight to be accorded this consideration in establishing rates is a matter for Congress, as is the matter of whether official military travel should be accorded preferential rates in the interest of national defense. Congress has acted on both issues in the field of surface transportation, by amending Section 22 of the Interstate Commerce[37] Act to provide for reduced rates for

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[36] Every draft of the Civil Aeronautics Act contained rigid restrictions on the grant of free or reduced transportation. Hearings on Airline Pass Privileges before the House Subcommittee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., p. 17. The Senate expressed its views on the matter as follows: "Under law, air carriers are strictly prohibited from granting free or reduced-rate transportation to any person other than those listed in Section 403(b) of the Civil Aeronautics Act * * *." Senate Report No. 1585, 82d Cong., 2d Sess., p. 1. When reduced rate air transportation for the clergy was deemed desirable, the matter was submitted to Congress, which amended Section 403(b) of the Act to permit such reduced rates. Hearings on Airlines Fares for Ministers, before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 84th Cong., 2d Sess., pp. 2, 24 (April 20, 1956).

[37] Section 22 of the Interstate Commerce Act, 25 Stat. 862 (as amended by 25 Stat. 862, 28 Stat. 643, 43 Stat. 1264, 49 Stat. 543, 50 Stat. 475, 50 Stat. 809, 54 Stat. 900, 901, 58 Stat. 751, 70 Stat. 702, 71 Stat. 564, 72 Stat. 1264) 49 U.S.C. 22. The text of this Section is set forth in its entirety in Appendix C, pp. 67a-69a, *infra*.

official military travel, as well as for unofficial furlough travel by servicemen. It has not seen fit to do so heretofore in the field of air transportation.

The precise issue was focused upon recently in a legal periodical.[38] The author concluded as follows:

> "The article has focused primarily upon sections 404 and 403 in order to clarify the framework within which Congress intended the Board to operate in the exercise of its economic regulatory powers. Correct application of sections 404 and 403 will enable the CAB to comply with the congressional intent and to move away from its ad hoc decisions of late. The Board is without power to liberalize the Federal Aviation Act to suit transitory policies but, rather, is responsible for enforcement of the act in accord with congressional intent.
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> "Public sentiment is quite naturally with the servicemen, but it was likewise with the clergy. Nevertheless, in the latter case the CAB enforced the act as written and the result was an amendment to section 403(b) permitting the clergy rate reductions. Therefore, it is submitted that Congress should authorize an amendment permitting military discounts on a standby basis in order to prevent the Board from compromising its statute in favor of public sentiment and promotion." *Id.* at p. 585.[39]

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[38] McGuire, *Federal Aviation Act—Interworkings of Section 403 and 404—Military Standby Fares.* 32 Journal of Air Law and Commerce, 571 (1966).

[39] This same view was expressed in *Ex Parte Koehler,* 31 F. 315 (Cir. Ct., D. Oregon, 1887), where the issue was whether railroad passes could lawfully be issued to the immediate families of railroad employees where Section 22 of the Interstate Commerce Act did not list such persons as entitled to free or reduced-rate transportation. The Circuit Court declared such passes to be violative

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD S. BOROS
ROBERT C. LESTER
BOROS & LESTER
1120 Connecticut Avenue, N. W.
Washington, D. C. 20036

WARREN A. GOFF
315 Continental Avenue
Dallas, Texas

Attorneys for Petitioners

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of the unjust discrimination provisions of that Act. It concluded: ". . . Doubtless it would be expedient to include the immediate family—the wife and minor children—of the employee in this exception. By this means the corporation might, without material cost to itself, or prejudice or injustice to any one, augment in a graceful way the compensation and convenience of faithful servants. But the remedy, if any, is with congress and not the courts." (*Id.*, at 321-322).